

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Review of the Commission's Rules)
and Policies Affecting the Conversion)
to Digital Television)
)

MM Docket No. 00-39

COMMENTS OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
AND THE PUBLIC BROADCASTING SERVICE

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AND THE PUBLIC BROADCASTING SERVICE**

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") (collectively referred to as "Public Television") submit their comments in the above-captioned proceeding. APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 353 noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, and engages in planning and research activities on behalf of its members. PBS is a nonprofit membership organization of the licensees of the nation's public television stations. PBS distributes national public television programming and provides other program-related services to the nation's public television stations.

Public Television has been a regular participant in Commission proceedings affecting the interests of the nation's public television proceedings, including the Commission's DTV proceeding. Public Television welcomes the Commission's issuance

of the Notice of Proposed Rule Making (“*Notice*”) and the Commission’s examination of issues affecting the transition to digital television. As the Commission is aware, public television has been among the industry leaders in moving toward digital television, and Public Television appreciates the opportunity to comment on the issues raised in the *Notice*. Many of those issues will have a significant impact on public television and on the ability of public television stations to continue the services they provide to the viewing public. Public Television is filing these Comments in order to bring to the Commission’s attention the unique concerns of public television stations.¹

In addition, while Public Television understands the Commission’s desire to limit the scope of this proceeding to those items described in the *Notice*, Public Television is concerned that the Commission has not yet addressed some of the specific proposals to benefit public television licensees advanced by public television in earlier DTV proceedings.² Because many of those proposals will become moot if they are not granted now, with serious adverse consequences for public television, Public Television urges the Commission to expand the scope of this proceeding and to grant the relief Public Television requested.

¹ APTS and PBS have joined the Comments filed by the Joint Broadcasters and support the positions advocated there. These Comments will address issues of unique or particular concern to public television stations.

² In its Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, the Commission indicated that it would consider these proposals in its planned periodic review of the digital transition. See *In Re Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd. 6860, ¶¶ 41-42, 64 (1998). Public Television had anticipated that the issues discussed in these Comments would have been raised by the Commission since the failure to discuss them now will render them moot.

SUMMARY OF COMMENTS

Replication: Although Public Television supports the underlying goal of continuing service to viewers, Public Television opposes a replication requirement during the transition. Such a requirement would impose too onerous a financial burden upon many public television licensees, all of whom rely on private contributions and government funding. For these public television licensees, the costs of replicating their NTSC service areas could dilute their ability to continue the services they provide their communities. Given their limited financial resources, public television stations should not be forced to divert funding from these services to meet a Commission-imposed replication requirement.

Furthermore, it is too soon to tell whether a replication requirement will be warranted in the post-DTV transition world. Licensees simply do not know enough about DTV, reception quality, the impact of weather phenomenon, and a host of other factors that may inform any replication decision to determine whether a replication requirement will be necessary or prudent. More experience with DTV is required before any decision is made concerning post-transition replication. Indeed, imposing a replication requirement now could also preclude the Commission from taking the opportunity presented by the surrender of the NTSC spectrum to materially diminish, if not eliminate, the disparities between UHF and VHF allocations and to allow licensees to make other channel adjustments in order to compete more effectively. Therefore, the Commission should defer consideration of a post-transition replication requirement until its next periodic review. If at that time the Commission opts to impose such a requirement after

the transition, the Commission should allow stations, especially public television stations, a reasonable period of time within which to come into compliance.

Maximization: The concept of maximization remains important. Public Television urges the Commission to allow stations to maximize their DTV facilities, without regard to replication, as long as they provide a reliable signal to their city of license and do not cause interference to existing NTSC or allotted DTV stations.

The DTV Transmission Standard: Reliable over the air broadcasting is critical to Public Television's mission to reach all American citizens. Public Television continues to be concerned with the performance of the current 8-VSB transmission standard, and the lack of objective data on the comparative performance of a COFDM system. Thus, it supports the broadcasters' initiative to test improvements in 8-VSB performance and to test COFDM systems for application in the United States. That testing will permit the Commission to make an informed decision concerning the appropriate DTV standard.

Receiver Performance: Public Television also supports active Commission involvement in ensuring the quality of DTV receivers. Without assurance that DTV receivers will permit viewers to consistently receive a quality signal, consumers will not purchase DTV sets, and the transition will be imperiled. The Commission can prevent this from happening by establishing minimum performance thresholds for DTV receivers.

Channel Selection by Out-of-Core Stations: Public Television urges the Commission not to establish a deadline now for stations allotted out-of-core channels to select a post-transition in-core channel. While early election would have some benefits, it could also lead to unwise channel elections, with disastrous consequences for stations

and viewers alike. Channel elections must be based on sufficient information. At this time, stations lack DTV experience necessary for informed decision-making. This is particularly true for public television stations, because they are not required to complete their DTV construction until May 1, 2003. Waiting until the next periodic review to impose a channel election deadline will allow for more informal decision making, without jeopardizing a timely transition.

Use of Channels 6, 3 and 4: Public Television opposes new uses for Channel 6 and encourages the Commission to avoid new uses for Channels 3 and 4. Reallocation of the Channel 6 spectrum would impede the plans of those stations that intend to return to Channel 6 for their digital operations after the transition. In addition, it would make it harder for out-of-core stations to find in-core spectrum by reducing the amount of available spectrum in-core. The Commission should also avoid new uses of Channels 3 and 4 because they would unnecessarily burden consumers, who have invested in VCRs and cable boxes that rely on the availability of those channels.

Application Processing: Public Television recognizes that the proposal to have mutually exclusive applicants work out their differences has some initial appeal, but Public Television firmly believes that the proposal will not produce a fair allocation of licenses. Rather, Public Television supports in general the use, during the transition, of the processing proposals submitted by the Joint Broadcasters. Those include:

- establishing a cut-off date for filing new DTV applications and for modifications of existing facilities and applications;
- imposing a filing moratorium after the cut-off date;
- processing the pool of applications filed before the cut-off date by granting all checklist, non-checklist, and maximization applications that do not seek to cause interference beyond a station's allotment parameters; and

- encouraging the applicants to resolve any mutually exclusive situations among themselves, including allowing compensation to be paid.

However, rather than dismissing the remaining unresolved mutually exclusive applications, Public Television urges the Commission to give:

- first priority to out-of-core DTV stations moving into the core, because this would allow the continuation of service to existing viewers;
- second priority to first broadcast service, whether DTV or NTSC in recognition of the Commission's longstanding preference for first service in a community; and
- third priority to upgraded applications, with DTV upgrades taking priority over NTSC upgrades, and DTV upgrades seeking comparability taking priority over DTV upgrades that do not.

If two competing applications to upgrade DTV service both seek comparability and cannot work out their differences, the applications should be dismissed with prejudice.

In addition, during the transition, the Commission should adopt some exceptions to the proposed priorities in order to protect translators that are providing the only public television service to their communities. Translators are essential to free, over-the-air broadcast service to rural America and allowing any station to dislodge a translator providing the only local service to a community is inconsistent with Section 307(b) and disserves the public interest.

These priorities would apply only during the transition. Once the transition is at or near completion, the Commission will have sufficient information to determine whether the criteria should be retained, modified, or replaced. Any determination on that issue at this time, however, would be premature.

Tower Siting: Public Television urges the Commission to take a more active role in resolving tower siting and zoning disputes stations encounter with local governments and private tower owners. A number of public television stations have reported

unreasonable conduct by local government authorities that has made it difficult and costly for them to obtain sites for their DTV transmitters. Commission intervention in the form of mediation and consultation should minimize these burdens and unreasonable obstacles, thereby facilitating public television licensees' transition to DTV.

Public Television Issues: Public Television wishes to call to the Commission's attention certain issues that are not addressed in the *Notice*, but which must be resolved now before they become moot. These issues are unique to public television and are critical to their successful participation in the digital transition. They were raised in Public Television's filings in the earlier stages of the DTV proceedings and the Commission indicated that they would be address in connection with its periodic reviews.

- In order to assist public television stations in making the transition to DTV, the Commission should allow public television stations that meet certain hardship standards to elect an overnight switch of their NTSC and DTV stations instead of building a parallel digital transmission facility that they simply cannot afford. While the majority of public television stations will not likely elect this option, for a small group of hardship stations this option may well mean their survival post-transition.
- The Commission should allow public television licensees with two stations in the same market to construct only one DTV facility and to switch their continuing NTSC station to DTV on an overnight basis. Giving these licensees this flexibility will enable them to deal with the financial hardships of operating four television stations where their resources will be strained by those costs.
- The Commission should require successful bidders for channels 60 to 69 spectrum to reimburse public television stations in that spectrum for the costs of moving to in-core channels.
- The Commission should allow public television stations with both their NTSC and DTV channels located outside of the core to defer construction of their DTV facilities until the end of the transition, when their permanent channels have been assigned. This is necessary to alleviate the burden of constructing two DTV stations.

ARGUMENT

I. The Commission Should Not Impose A Replication Requirement Now

A. The Commission Should Not Require Replication During The DTV Transition

The FCC should not require public television stations to replicate their NTSC service areas during the DTV transition. Public television licensees, who rely on contributions from viewers and underwriters and on limited federal, state, and local government funding, will be hard pressed to construct their DTV stations and operate both their NTSC and DTV facilities during the transition. This is particularly true for licensees of smaller public television stations serving rural areas and smaller communities and second stations in larger markets who serve distinct audiences and needs. These licensees do not have the resources to pay the high electric bills and other costs likely to result from any requirement that they fully replicate the coverage areas of their NTSC stations. They must conserve their limited financial resources to provide programming and other community outreach services. Requiring these licensees to replicate their NTSC coverage areas will dilute their ability to provide these services, especially since DTV operation is unlikely to result in any increased audience or fundraising potential for public broadcast services.

Further, requiring replication during the transition could also increase a station's cost of constructing a DTV station by forcing it to locate its transmitter at a site near its current NTSC transmitter. As noted below, a number of public television stations are having difficulty finding new tower sites or obtaining local zoning clearance for new towers. Others have to build or find new towers as their current tower landlords reclaim

extra capacity on the tower space for their own DTV antennas. If public television stations are required to replicate, they will be required to find antenna sites close to their NTSC sites, even though less expensive sites may be available some distance from their NTSC sites. In addition, some of those stations will be required to purchase more expensive directional antennas, and some may be required to operate with more power than prudent business requirements would dictate if replication is required.

Lastly, while Public Television supports the general policy objective of replication since it assures that viewers who currently receive analog programming will continue to receive DTV programming, Public Television also believes that there are circumstances in which replication may diminish a station's service to its community. For example, in many cases, the population within a market has shifted and areas outside a station's NTSC Grade B contour have changed from farms and country to suburban communities. In some cases, areas within the NTSC Grade B contour have lost significant population as industries have moved out of the community or residential areas have become commercial or industrial. Licensees should be given the flexibility to follow these shifts and to provide service to more populated areas rather than strictly adhering to original contours that no longer make sense.

For these reasons, the Commission should not impose a replication requirement during the transition. In its *Sixth Report and Order*, the Commission stated that, in light of many of these and similar considerations, it would allow licensees, particularly public television licensees, to operate digitally with less power than that specified in the DTV

Table of Allotment during at least the early phases of the digital transition.³ That was good policy then; it remains good policy today.

B. The Commission Lacks Sufficient Information Upon Which To Base A Post-Transition Replication Requirement And Should Defer Imposing Such a Requirement

The Commission should not impose a post-transition replication requirement on television stations at this time. Too little is known about DTV transmission and reception to determine now whether a replication requirement is warranted and, if so, what that requirement should entail. As the Commission is aware, there is substantial controversy as to the adequacy of the 8-VSB transmission standard the Commission adopted in the *Fourth Report and Order*⁴ and whether DTV signals transmitted using that standard can be received in the home without an outdoor antenna. There are also questions concerning the adequacy of television receivers to receive 8-VSB signals in a reliable and consistent manner.

As the transition continues, a host of other unforeseen yet legitimate questions might arise, such as the signal strength necessary for reception of a reliable signal; the impact of rain and other weather phenomena on reception; the realistic coverage of stations operating at various ERP and HAAT; and under what circumstances DTV stations will cause interference to each other. In short, there is still a lot to be learned

³ See *In Re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd. 14,588 ¶ 33 (1997) (discussing decision made in Fifth Report and Order).

⁴ See *In Re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17,771 (1996).

about DTV transmission and reception and the possibilities of interference between DTV stations. Until more is known, it is premature to impose a replication requirement.

In addition to these technical considerations, imposing a post-transition replication requirement for a station's current NTSC service area could perpetuate the current coverage of broadcast television stations, with the inequities and service holes that currently exist, or at least make it more difficult for licensees in a market to achieve coverage parity. The end of the transition creates the opportunity for the Commission to reduce substantially or even to eradicate the coverage disparities between UHF and VHF stations; to bring order to the haphazard coverage areas of stations licensed to different communities in the same economic market; and to encourage local broadcasters to operate from common transmitter sites and local governments to facilitate such antenna farms, thereby both improving reception and reducing RF pollution. Imposing a replication requirement will impede the realization of these objectives.

A more fundamental problem, as the Commission acknowledges,⁵ is how replication should be measured. The Commission discusses four various standards in the *Notice*, including population and areas served, but does not show a clear preference for any method. It is impossible to develop a meaningful replication requirement until this fundamental measurement issue of the appropriate measurement standard is resolved; and this issue cannot be meaningfully addressed until more is known about DTV transmission and reception. For all of these reasons, the Commission should defer consideration of a

⁵ See *Notice* ¶¶ 22-23.

post-transition replication requirement until its next periodic review of the conversion to DTV.

Finally, should the Commission decide to adopt a post-transition replication requirement, either in this proceeding or in a subsequent periodic review of the DTV transition, Public Television urges the Commission to give television licensees, particularly public television licensees, a reasonable period of time to satisfy the requirement. Giving licensees time to fulfill the requirement will allow the Commission to find channels for existing stations with DTV assignments outside the core, and give other licensees time to determine whether they need to change their DTV channel to achieve replication or make other adjustments to satisfy any replication requirement. Furthermore, by giving public television licensees time to fulfill the requirement, the Commission will assist them with the time-consuming process of raising funds for the requisite modifications, much as the Commission did by reserving channels for noncommercial use and allowing public television licensees more time than commercial stations to construct their DTV stations.

II. DTV Licensees Should Be Allowed to Maximize or Otherwise Modify Their Facilities During the Transition

While Public Television believes that requiring licensees to replicate their NTSC service area during the transition is unwise, it also believes that the Commission should allow stations to maximize their DTV facilities, without regard to replication, as long as they provide a reliable signal to their city of license and do not cause interference to existing NTSC or allotted DTV stations. As has become apparent, the transition to DTV will entail a number of twists and turns that were not anticipated when the Commission adopted its DTV rules. Stations should be allowed to respond to those twists and turns,

and to the economic and business realities they will face during the transition, in the manner the licensee believes best. That is especially true for public television licensees whose financial situation is less secure than their commercial counterparts.

Thus, where a television licensee believes that improving its DTV facilities over those granted in the DTV Table of Allotments or locating its transmitter site in a different location will improve its ability to serve its community, the Commission should not hamper the licensee's ability to pursue those decisions by imposing regulatory burdens that, for example, confine the station to its allotted DTV facilities or require it to provide a certain level of signal strength over its principal community. Given the nature of digital operation, signal strength requirements over a principal community will not assure better reception and could hamper a licensee's ability to respond to market demands. Indeed, allowing stations to modify their facilities during the transition may expedite the transition by allowing UHF stations to reach parity with VHF stations – something that has been a desirable objective since the Commission first allocated UHF spectrum for television use.

III. Public Television Supports New Field Tests By A Balanced and Impartial Committee Regarding the 8-VSB Standard

Public television is committed to the rapid establishment of over-the-air reception of DTV signals and has been actively involved in the evaluation and development of a workable transmission standard from the inception of the DTV initiative. Although significant progress has been made, Public Television believes that more data is needed to evaluate the 8-VSB standard. In addition, a detailed comparison of the 8-VSB and

COFDM modulation schemes is necessary before the Commission can determine whether and how to revise the DTV standard.⁶

Public television has fought to maintain the viability of over-the-air broadcasting to achieve its mission of reaching all citizens, including those who cannot afford or do not have access to cable or satellite technology. At present, nearly one-third of Americans do not subscribe to cable, and fewer than 7 percent of households subscribe to DBS.⁷ Because so many Americans rely on over-the-air broadcasting, the transmission standard ultimately adopted must accommodate the widest variety of conditions and must be the optimal standard for terrestrial digital broadcast services.

The tests that have been conducted to date, primarily by Sinclair Broadcasting Group, have raised concerns about the viability of indoor, over-the-air reception of 8-VSB transmissions, especially where significant multipath interference exists. Other concerns include the thoroughness of the Sinclair field tests and the adequacy of Sinclair's receivers. While possible cures have been suggested, including improved receiver technology and/or new chips, there have been no conclusive tests. In the absence of further testing, Public Television believes it is premature for the Commission to reach a definitive conclusion whether to retain the 8-VSB standard, modify the standard to include a COFDM transmission system, or allow stations to make the choice.

⁶ See Notice ¶¶ 11-12. Sinclair Broadcasting Group petitioned the Commission to allow the use of both standards, arguing that COFDM offered easier reception with simple antennas and would allow more varied services with greater capacity for improvements in the technology. The Commission dismissed the petition and indicated that the issues Sinclair raised would be addressed in this proceeding. *Id.* ¶ 11.

⁷ See *Television Bureau of Advertising Online*, (visited May 16, 2000) <http://www.tvb.org/tvfacts/index.htm>.

A group of broadcasters, led by MSTV has undertaken a six month program to test improvements in VSB performance and to test COFDM systems for application in the United States. Public Television is supporting and participating in this effort.

IV. The Commission Must Take An Active Role To Ensure That DTV Receivers Allow Reliable, Quality Reception of the DTV Signal

Public Television supports the Joint Broadcasters' Comments with respect to DTV receiver standards. In addition, Public Television urges the Commission to take an early and active role in ensuring that consumers have access to quality receivers. Put simply, the public will not embrace DTV until quality receivers are available at reasonable prices. Many consumers are understandably reticent to buy an expensive new piece of equipment without some assurance that it will actually improve their reception. Realistically, then, the failure to assure quality reception of 8-VSB signals will delay, and seriously disadvantage the deployment of over-the-air digital broadcast services.

The Commission must take steps to prevent such a failure, as it has done in the past. The history of UHF demonstrates how readily Commission involvement can stimulate public acceptance of a new service. UHF was virtually moribund until Congress passed the All-Channel Receiver Act.⁸ It remained an under-utilized resource until the Commission took aggressive steps to insure the adequacy of UHF receivers, including adopting rules requiring that (1) all TV receivers have tuners with improved UHF noise figures; (2) TV receivers have tuners with capabilities more comparable to

⁸ See Pub. L. No. 87-529, 76 Stat. 150 (1962) (codified at 47 U.S.C. §§ 303(s), 330).

VHF tuners; and (3) all TV receivers be equipped with a UHF antenna.⁹ The Commission's actions were so successful that the number of commercial UHF stations increased 504 percent, from 76 in 1960 to 459 as of July 31, 1987.¹⁰

Aggressive action is called for here as well. Setting minimum performance levels¹¹ for receivers and doing so as quickly as possible will give consumers greater confidence in the quality of receivers. Greater consumer confidence will likely spur the sale of receivers, which will dramatically improve DTV set penetration rates and accelerate the transition. Moreover, the Commission should not wait for the testing of 8-VSB reception to be completed before it adopts receiver performance thresholds. Instead, it should work to develop performance thresholds as quickly as possible and incorporate test results as it receives them. By acting quickly and aggressively, the Commission will facilitate the transition to digital. Failure to act will postpone DTV acceptance and could undermine the transition entirely or relegate over-the-air television to second class status.

⁹ See *In Re Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, Report and Order, 3 FCC Rcd. 638 ¶ 28 (1988) (describing development of UHF service and actions taken by FCC to promote UHF service); see also *In Re Improvements to UHF Television Reception*, Report and Order, 90 FCC 2d 1121 (1982) (evaluating ways of improving UHF service and summarizing FCC's prior efforts).

¹⁰ *In Re Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, Report and Order, 3 FCC Rcd. 638 ¶ 29.

¹¹ Public Television agrees with the Commission that minimum performance thresholds, rather than mandatory technology specifications, are appropriate. See *Notice* ¶ 13. The Commission should emphasize the quality of reception, rather than require a particular standard for all receivers.

V. The Commission Should Postpone Its Decision On A Channel Election Deadline Until Its Next Periodic Review

Public Television appreciates the Commission's concerns regarding the early election of post-transition DTV channels since a number of public television stations will have to select a new channel at the end of the transition. However, Public Television believes that the selection of a channel must be the product of informed decision-making. Although early election would allow stations to plan facilities, order equipment, and arrange for construction, it would also turn their elections into mere guesstimates, based on inadequate technical information. As a result, their decisions could prove wrong, to their detriment and to the detriment of the viewing public.

Given the current state of the transition to DTV, it is unlikely that stations will have either enough data or enough DTV experience by May 1, 2004, the election date the Commission proposes, to make a meaningful and appropriate channel election. The lack of DTV experience could be particularly significant for public television stations because they are not required to complete construction until May 1, 2003. One year of direct experience and conversations with commercial operators as to their experiences for a somewhat longer period of time are unlikely to provide sufficient data to select one DTV channel over another. Since receiver penetration is likely to be limited by May 1, 2004, the industry may not know what kinds of reception problems exist at the fringes of their service areas or in areas populated with office buildings or multi-story residential units. Furthermore, to the extent that the 8-VSB transmission standard is altered or replaced by a different standard altogether, broadcasters will have even less experience with that standard and less time to elect their post-transition channel.

For these reasons, Public Television urges the Commission to wait until its next periodic review to determine a channel election deadline. That review is likely to occur in 2002 or 2003, and an election deadline can be established by 2004, at the latest. Assuming the most favorable scenario – a full transition by December 31, 2006 - that will still give stations two years to make and implement their decisions concerning their ultimate DTV channel. While Public Television appreciates the Commission's desire to speed the transition along and to give stations operating outside the core the opportunity to select a permanent channel early, the Commission must not impose requirements that force stations to make decisions in an information void. Waiting until the next periodic review will allow for more well-informed decisions and still accommodate the December 31, 2006 target date for the end of the transition.¹²

VI. The Commission Should Preserve Channel 6 for Broadcast Television and Limit or Prohibit Alternative Uses Of Channels 3 and 4.

A. The Commission Should Continue Using Channel 6 For Broadcast Television

Public Television opposes the elimination of Channel 6 from the DTV allotment to accommodate new services. As Public Television argued in the Digital Audio Broadcasting proceeding,¹³ reallocating the spectrum currently used for television Channel 6 would impede the plans of some stations to return to Channel 6 for their digital operations at the end of the DTV transition. Many stations have made such plans in

¹² Moreover, since the transition could be extended beyond 2006 due to insufficient set penetration rates, *see* 47 U.S.C. § 309(j)(14), waiting until the next periodic review to establish a channel election deadline should not be problematic.

¹³ *See In Re Digital Audio Broadcasting Systems and Their Impact On The Terrestrial Radio Broadcast Service*, Notice of Proposed Rule Making, 15 FCC Rcd. 1722 (1999).

reliance upon previous assurances that Channel 6 would remain in the digital core, and in recognition of Channel 6's advantageous propagation properties for television operation.

Moreover, the elimination of a core channel will reduce the number of channels available in the core for stations with out-of-core DTV channels. Those stations will be required to find new, in-core channels at the end of the transition. By deleting Channel 6 from the DTV allotments, the Commission is taking away a desirable channel and making it more difficult for displaced licensees to acquire suitable in-core channels. Further, the public understands that Channel 6 is part of the television broadcast spectrum and their television sets are designed to receiver Channel 6. That will be true for DTV sets manufactured during the transition since Channel 6 will remain available during that period.¹⁴ As a result, a public education program will be required to acclimate viewers to the loss of Channel 6. For these reasons, the FCC should not reallocate the Channel 6 spectrum.

B. The Commission Should Minimize New Uses of Channels 3 and 4

Similarly, the Commission should minimize new use of Channels 3 and 4 because such new uses would unnecessarily burden consumers as they transition to DTV. Many cable boxes and VCRs are wired for output on Channels 3 and 4 on the assumption that both channels would not be assigned to the same community. Consumers will likely continue to use those devices during the transition and perhaps beyond.

In its DTV Table of Allotments, however, the Commission has allocated Channel 3 and 4 in the same market or in adjacent markets, thereby increasing the

¹⁴ Public Television assumes that the Commission will continue to require receiver manufacturers to include Channel 6 on their tuners, at least during the transition.

prospect that interference will be caused to those attempting to use their VCRs. To avoid further aggravating this problem and to protect the public's investment in these devices, the Commission should not introduce new uses for Channels 3 and 4, at least until it allows a reasonable period of time for phase-out of these devices.

**VII. Public Television Recommends That The Commission Adopt
Application Processing Procedures and Priorities**

Public Television generally supports the proposal advanced by the Joint Broadcasters' Comments with respect to processing procedures for the DTV and NTSC applications currently pending before the Commission and for any applications that might be filed during the remainder of the transition. As the Joint Broadcasters' Comments explain, the problem of mutual exclusivity looms large and presents a formidable challenge to the Commission, which must find a compromise that avoids undue delay and yet allows a principled decision between competing applications. Finding this balance is further complicated by the fact Commission's decision may have "daisy chain" effects with ramifications far beyond the two mutually exclusive applications.¹⁵

Given the complexity of these issues, the Commission's proposal that it grant all applications regardless of interference and let the permittees "work it all out" is

¹⁵ Notwithstanding the Commission's recent decision in the *Comparative Standards for Noncommercial Educational Applicants* proceeding to subject noncommercial applicants to auctions where they apply for commercial channels, the Act does not allow the Commission to subject to auctions noncommercial television applicants whose applications are mutually exclusive with commercial television stations where the noncommercial station is operating on a reserved channel. See *In Re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, MM Docket No. 95-31, FCC 00-120 ¶¶ 101-111 (rel. April 21, 2000) ("*Comparative Standards Report and Order*"). Moreover, given the limited financial resources of public television stations and their dependence upon public donations and governmental funding, public television stations lack the financial wherewithal to succeed at auctions.

understandable.¹⁶ However, Public Television believes that that approach will seriously disserve the public interest. Granting all applications and leaving the stations to resolve interference problems by negotiation would yield one of two disastrous results:

(1) larger, more prosperous stations would beat out smaller or less well-funded stations, with public television stations most likely to lose every time they must compete with a commercial station; or (2) stalemates would occur, the interference problems would remain unresolved, and viewers would suffer as a result. In short, the Commission's proposal would lead to serious inequities and loss of service.

The Commission can avoid those outcomes by adopting procedures proposed by the Joint Broadcasters and establishing priorities among mutually exclusive applications that are designed to advance the Commission's regulatory and policy objectives for television broadcast service. Establishing the procedures will permit the Commission to handle the large number of pending applications in an orderly and structured manner and establish a workable framework for processing future applications. While Public Television generally supports the framework proposed by the Joint Broadcasters, it believes that the Commission can and should go further and establish priorities for resolving some of the mutually exclusive applications along the lines suggested below. Public Television believes that these priorities reflect a fair compromise between competing interests, promote DTV over NTSC as the new and enduring service, ensure continuing service to existing viewers, and protect the valuable services of public television from encroachment by larger, better-funded commercial stations. While there

¹⁶ See Notice ¶ 44.

may be unique situations where the public interest will be better served by varying from these proposed guidelines, these proposals would set a basic matrix for decisions. The Commission would, of course, retain the ability to consider individual factual circumstances on a case-by-case basis, either pursuant to waiver petitions or other similar procedural devices.¹⁷

A. Application Processing During The DTV Transition

Public Television supports the Joint Broadcasters' proposal to: (1) establish a cut-off date for filing new DTV applications and for modifications of existing facilities and applications, (2) impose a filing moratorium after the cut-off date; and (3) process the pool of applications filed before the cut-off date by granting all checklist, non-checklist, and maximization applications that do not seek to cause interference beyond a station's allotment parameters. Public Television supports the June 16, 2000 cut-off date suggested by the Joint Broadcasters since all initial applications for DTV construction permits should have been filed by May 1st, and May 1st was the cut-off date for filing applications for facilities that would be protected from Class A applicants. Thus, Public Television urges the Commission to issue a public notice promptly setting the proposed cut-off date so that it can begin processing the applications pending before it.

¹⁷ Public Television opposes the use of formal, adjudicatory hearings to resolve mutually exclusive applications, except in very rare cases where, for example, the decision turns on credibility determinations. Public television licensees cannot afford those hearings and, as the Commission's 40+ years of experience with comparative hearings attests, the costs both to the parties and the Commission do not justify their use. See *Comparative Standards Report and Order* ¶ 10 (concluding that traditional hearings are costly to noncommercial applicants who can ill afford to incur such costs, use significant Commission resources, and introduce significant delay).

Public television also supports the Joint Broadcasters' proposal to give parties a reasonable period of time to work out any mutually exclusive situations. As the Commission has recognized, private resolution affords the parties greater flexibility than a Commission imposed solution, and avoids the burdens of a regulatory proceeding. In that regard, Public Television urges the Commission to allow compensation as a mechanism to resolve mutually exclusive situations. Public Television recognizes that, by allowing compensation, there is some risk that applicants may file mutually exclusive applications for the purpose of being bought out. However, Public Television believes it is highly unlikely that any applicant with a pending application contemplated such "greenmail" when it filed the application in the first instance. Thus, at least for applicants with pending applications, the Commission should allow one applicant to compensate another as a means of resolving mutual exclusivities.

B. Priorities Among Remaining Mutually Exclusive Applications

Of the applications that remain, Public Television recommends the following priorities:

Priority One: DTV Moving from Out-of-Core to In-Core

First priority should be given to DTV stations moving from out-of-core channels into the core. This relocation is essential to the success of the DTV transition and will allow the continuation of existing service to viewers. Further, where out-of-core DTV stations choose to replicate their service area in-core, they should have priority over applicants seeking to maximize their service area and applicants for new DTV stations. That is true whether the out-of-core applicant is seeking to replicate its NTSC or out-of-core coverage area, whichever is greater. Again, this is essential to preserve service to

existing viewers. Where an out-of-core applicant seeks to improve its coverage while moving into the core, it should be treated in the same manner as any other applicant seeks to improve coverage, although it should be allowed to amend its application to seek replication only.

Priority Two: First Broadcast Service

First broadcast service, whether NTSC or DTV, should be given second priority. The Commission has historically given a first broadcast service the highest priority and has again employed that principle in its recent Report and Order establishing comparative hearing criteria for mutually exclusive noncommercial applicants.¹⁸ While NTSC is a service that is being phased out, an applicant who is proposing a first NTSC service should be given priority over DTV applicants seeking to maximize or improve service coverage for the reasons that the Commission has historically given primacy to first-service proposals. Indeed, it can be assumed that an applicant for a new NTSC station would operate initially as an NTSC station and then change, on channel, to DTV. This priority will promote service to more viewers and, because of the presumed transition of a new NTSC station to DTV, will also promote the DTV conversion.

Priority Three: Upgrade Applications

Applications for upgrades should be assigned third priority, following those applications that promote the continuation of existing service, or provide a first broadcast service. Given the number and variety of competing upgrade applications that might be

¹⁸ See *Comparative Standards Report and Order* ¶¶ 20-27.

filed, however, additional criteria will be necessary to select among them. Public

Television suggests the following:

- a. When an application for an NTSC upgrade is competing with an application for a DTV upgrade, the DTV upgrade should have priority. Congress has chosen DTV to be the enduring service, and the Commission should therefore favor applications that propose to enhance that service. Furthermore, by giving priority to DTV upgrades, the Commission will help accelerate the DTV transition.
- b. If two DTV stations are seeking to upgrade, the station seeking comparability with other stations in the market with broader coverage should have priority.¹⁹ This will provide viewers with the greatest variety of services, help eliminate the disparity between UHF and VHF service, and promote the competitive equality of stations in the market, thereby enhancing competition among the stations in the market with its attendant benefits.
- c. Where two DTV stations are seeking to upgrade and both seek comparability or otherwise do not come within one of the priorities set forth here, Public Television supports the Joint Broadcasters' proposal that the Commission dismiss the applications. The threat of dismissal will serve as a significant incentive for the parties to work out their differences. However, for that threat to be meaningful, the dismissal should be with prejudice and the applicants should be precluded from resubmitting their

¹⁹ The Commission could measure comparability in terms of the audience reached or the extent of geographic overlap or such other criteria as would measure in a reasonable manner whether the station seeking the upgrade was attempting to obtain coverage parity with the station in the market with the best coverage.

applications for a period of time unless the mutual exclusivity that led to the dismissal is resolved.

C. Protecting Translator Service during the Transition

While Public Television recognizes that translator service is a secondary service, Public Television believes that translators that provide the only public television service to their community should be protected during the transition. As the Commission is well aware, translators provide a vital service to rural America, providing television network, public television, and other broadcast services to their viewers without charge. These facilities are ideal for serving small, sparsely populated areas. Allowing any station to dislodge a translator that provides the only local service to a community does not serve the public interest and is inconsistent with Section 307(b). This is especially true for translators rebroadcasting the programming of a public television station. These translators currently provide the only free public television service to vast portions of the western United States and to rural areas throughout the South and East. They are vital to the Congressional mandate that public television service should be made available to all Americans.

Thus, Public Television urges the Commission to establish a general exception to its proposed priorities, and to the processing criteria advanced by the Joint Broadcasters, where an application would require a translator that provides the only public television service to cease operation. This exception should not apply where a station with an out-of-core DTV allotment seeks to re-locate within the core and proposes facilities that would replicate its DTV or NTSC service contours. Giving the out-of-core stations a first

priority preserves existing service and since they are full service stations, they should have priority over translators.

D. Application Processing After The DTV Transition

After the transition is complete and NTSC service has ceased to exist, many of these procedures and priorities may no longer be relevant. Thus, Public Television believes that the Commission should limit these processing criteria to the transition period and should revisit the treatment of mutually exclusive applications toward the end or shortly after the end of the transition. At that point, the Commission will have had the benefit of many years of DTV experience and may be in a better position than it is currently to determine whether these procedures should be retained or replaced by new or amended procedures and priorities.

VIII. The Commission Should Intervene In Zoning And Tower Siting Disputes

In response to the *Notice*, APTS and PBS polled their member stations to ascertain whether they were experiencing problems in obtaining towers or leasing tower space. The results indicate that, although most public television stations have been able to arrange for new towers or space for their DTV antennas, a number have faced serious problems in securing towers and getting zoning clearance. Both local governments and tower owners have made it difficult for public television stations to survive. Public Television believes the Commission should assist in resolving these problems.

A. APTS and PBS Members Have Experienced Difficulties In Dealing With Local Governments and Tower Owners On Tower Siting Issues

A number of public television stations have reported to APTS that they have faced substantial obstacles in finding suitable transmitter sites, primarily from local governments. Zoning boards and city councils often take too long to render decisions on

tower siting matters or fail to act at all. Some local governments have refused to accept valid engineering and environmental studies, apparently in order to appease local residents concerned about RF radiation or aesthetics, even though the studies in question were properly designed and proved that the proposed towers did not pose health, safety, or aesthetic risks. Other local governments unduly restrict tower placement. Building moratoria in state forests and other restrictive land use regulations compound the problem. In addition, complying with the numerous state and local regulations can be very costly and time-consuming for any station, especially a public television station.

For example, one of the nation's smallest public broadcast stations encountered these problems when a small group of residents opposed the construction of a tower during a County Planning Commission meeting. Despite having an RF study from a reputable national engineering firm, the station was told it had to prove the accuracy of the RF model used in the study. The Planning Commission also refused to believe the station's assertion that building a new tower was its only option because there was no space available on existing towers. The station was forced to do additional, costly studies, and the members of its Board of Directors were forced to indemnify the Planning Commission in the event of a lawsuit by the county residents. The matter is still pending, despite the urgency of the station's request.

The scarcity of tower sites is another significant problem. Several public television stations have reported that they could not find adequate tower space because it did not exist in their communities. These stations also noted that local governments and local residents are often resistant to proposals to construct new towers. This scarcity adversely affects a station's ability to negotiate with tower owners (whether commercial

broadcasters or other private entities) who seek to capitalize on the tower shortage. Moreover, public television stations are at a unique disadvantage in their efforts to negotiate reasonable lease rates because they often lack the financial resources to construct their own towers.

B. The Commission Should Facilitate Resolution of Tower Siting Disputes

Given the difficulties experienced by several public television stations, Public Television believes that the Commission must develop a program to assist these and other similarly situated stations to find timely and workable solutions. While Public Television is aware that the Commission has created a Local and State Government Advisory Commission to address these and other local tower siting issues, many in the broadcast community are unaware of its existence. The Commission should make the existence of the Advisory Commission more widely known and should encourage stations, particularly those with limited resources and bargaining power, to seek out its assistance. Mediation by the Advisory Commission could well facilitate resolution of the regulatory and other issues faced by television stations seeking to construct new towers or to modify existing towers. In addition, intervention by the Advisory Commission would likely cut down costs and delays substantially, and lead to more cooperative relationships between government officials and stations.

Where mediation does not work, Public Television urges the Commission to take more aggressive steps and preempt unreasonable local governmental decisions or failure to act. Public Television appreciates state and local governments' concern for the health, safety, and welfare of their citizens and their interest in ensuring that the land within their jurisdiction is used appropriately. However, reports from APTS members indicate that a

few local governments have taken an intransigent position with respect to the construction of new towers or modification of existing ones, thereby delaying the provision of DTV service or increasing the cost to local public television stations. In those circumstances, the Commission can and should take positive action to facilitate the transition to DTV by preempting state and local land use restrictions that unreasonably prevent or delay the DTV rollout.²⁰

Similarly, the Commission should step in to mediate private disputes between public television stations and tower owners, or otherwise encourage them to resolve their disputes. Facilitating resolution of private disputes will ensure that the goal of promoting the DTV rollout is not impeded by tower owners making unreasonable demands. In addition, it will protect the continued viability of public television service.

IX. The Commission Must Resolve Certain Issues Related To Public Television That Will Otherwise Become Moot

Public Television appreciates the Commission's desire to limit the issues it addresses in the instant proceeding. However, there are a number of proposals designed to assist public television licenses, which Public Television suggested in its comments in the proceedings leading up to the *Fifth and Sixth Reports and Orders*,²¹ and which the

²⁰ Public Television has previously filed comments supporting preemption of state and local land use regulations that impede the DTV rollout. See Comments of APTS and PBS, filed in response to *In Re Preemption of State and Local Zoning and Land Use Restrictions On The Siting, Placement and Construction of Broadcast Station Transmission Facilities*, Notice of Proposed Rulemaking, 12 FCC Rcd. 12,504 (1997), on October 30, 1997.

²¹ See, e.g., Reply Comments of Association of America's Public Television Stations and the Public Broadcasting Service, filed January 24, 1997, in response to the Commission's *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd. 10,968 (rel. August 14, 1996) ("*Sixth Notice*"); Comments of The Association of America's Public Television Stations and the Public Broadcasting Service, filed November 22, 1996, in response to the *Sixth Notice*; Reply Comments of Association of America's Public Television Stations and the Public Broadcasting Service on Fourth Further Notice of Proposed Rule Making, filed January 22, 1996, in response to the Commission's *Fourth Further Notice of*

Footnote continued on next page.

Commission stated it would consider in its periodic review of the DTV transition. The following proposals will become moot if they are not resolved now, with potentially significant adverse consequences for some public television stations and their viewing audiences. Accordingly, Public Television urges the FCC to consider and adopt the following proposals.

A. Hardship Public Television Stations Should Be Allowed To Switch Overnight from NTSC to DTV

As Public Television stated in previous comments filed with the Commission, it is concerned that some public television stations will be unable to raise sufficient funds to construct their DTV stations within the timeframes mandated by the Commission or to afford the cost of operating two stations simultaneously. While stations with DTV allotments outside the core will be hardest hit, many other public television stations with small budgets may be unable to raise the money needed to construct a DTV station. Others fear they will be unable to afford the enormous power bills expected to result from operating two stations at once.

In order to assist these public television stations in making the transition to DTV, Public Television encourages the Commission to allow public television stations, which meet certain economic criteria, to elect an overnight switch of their NTSC facilities to DTV instead of being required to build a second transitional station. Specifically, Public Television recommends that the Commission allow the following public television

Footnote continued from previous page.

Proposed Rule Making, 10 FCC Rcd. 10,540 (rel. August 9, 1995) ("*Fourth Notice*"); Comments of Association of America's Public Television Stations and the Public Broadcasting Service on Fourth Further Notice of Proposed Rule Making, filed November 20, 1995, in response to the *Fourth Notice*.

licensees to elect this option: (a) those whose average annual cash revenue for the previous four years was \$2 million or less, (b) those who can demonstrate that the cost of constructing a basic pass-through transmission facility is greater than its average annual cash revenue for the previous four years, and (c) those who can demonstrate they have been unable to raise sufficient funds to construct their DTV station or lack the resources to operate two stations simultaneously.

The Commission should permit public television licensees, who wish to elect this option, to notify the Commission of their decision by the end of the construction period, *i.e.* May 1, 2003. Since all public television stations were required to file their construction permit applications by May 1, 2000, and thus all public television stations will have a construction permit before this proceeding is resolved, the Commission should give stations, who do not believe they can afford the costs of constructing a DTV station and operating two stations, to elect this option up until the last moment.

Affording public television stations this option will not undermine the DTV transition. As recognized by the Commission in establishing the build-out schedules, commercial stations will in reality drive the transition. Further, the option will be limited to a very small number of stations – stations whose economic situation clearly make the costs of building and operating two stations problematic. And, lastly, public television licensees will not take this option unless they believe they have no other choice. Public television stations that elect the overnight switch will do so knowing that they will lose audience to digital broadcasters, and that they will, until the end of the transition, not be able to take advantage of digital broadcast technology. Adopting this option also means that the station will be viewed by some in the community as old technology and perhaps

not worthy of continued support. However, for smaller stations, who cannot afford the construction and dual operational costs, this option is better than having to cease operation altogether.

B. The Commission Should Require the Successful Bidders for Channels 60 to 69 to Reimburse Public Television Stations for the Costs of Moving to an In-core Channel

The Commission should require the successful bidders in the auction of the reclaimed channels 60 to 69 spectrum (and subsequently the reclaimed channels 52-59 spectrum) to reimburse public broadcasters who are displaced from that spectrum for the costs of relocating their channels to the core spectrum. Public Television requested such reimbursement in its previous comments filed in the DTV proceeding. In its *Sixth Report and Order*, paragraph 80, the Commission stated that it would address this issue in a separate rulemaking. Reimbursement is necessary and equitable. It is unreasonable to expect the subset of public stations, who received out of core digital assignments, to invest in DTV facilities during the transition and then to incur the additional costs of moving those facilities at the end of the transition to make way for a new spectrum user. The availability of reimbursement will insure that public television stations with DTV assignments outside the core will be able to relocate to an in-core channel and continue digital operations after the transition.

The reimbursement could be either (1) from a general pool of funds collected from the auctioned spectrum, (2) from the commercial entities that acquire the spectrum in the affected market, or (3) derived in such other manner the Commission decides. Whatever reimbursement mechanism the Commission adopts, it must provide assurance of timely reimbursement of public television stations' costs associated with relocating to an in core digital channel. Further, the reimbursement mechanism must be secure.

Specifically, public broadcasters must be assured of (i) sufficient funds to cover their relocation and associated costs; and (ii) payment in a timely manner. Public stations need such assurances to plan and finance a timely and efficient transfer to in-core digital operations. Lack of full and timely reimbursement may delay stations' transfer to core spectrum and impede the ultimate reallocation of the spectrum.²²

C. Duopoly Licensees Should Be Given Flexibility

As the Commission is aware, a number of public television licensees operate two stations in the same market. While most of these licensees plan to construct DTV stations for both of their NTSC stations, Public Television urges the Commission to allow these stations to elect, on or before May 1, 2003, to construct only one DTV station prior to the end of the transition. Giving these stations such flexibility will allow them to avoid the costs of operating four stations in the market, while assuring that the community receives both DTV and NTSC public television service during the transition. At the end of the transition, these licensees would be required to switch their NTSC operation and commence provision of DTV service on that channel.

D. Public Television Stations With Out-of-Core DTV and NTSC Channel Should Be Permitted To Defer Construction of Their DTV Facilities

Under the Commission's current rules, stations with both NTSC and DTV channels outside the core will be required to find a channel in the core after the transition

²² There is precedent for such a reimbursement requirement, in that the FCC previously has required reimbursement for relocation of incumbents. For example, the PCS auction winners were required to reimburse incumbent 2 GHz licensees who were required to relocate. *See Second Report and Order, Amendment To The Commission's Rules Regarding A Plan For sharing The Costs Of Microwave Relocation*, 1997 WL 82594 (Feb. 27, 1997) at ¶5. Subsequently, the rule was amended governing this process to facilitate more effective negotiations among the parties in response to concerns that negotiations were not progressing as fast as they should and were potentially delaying the deployment of PCS service to the public.

and to construct a new DTV station on the in-core channel. As the Commission has observed, there are more out-of-core stations that must be accommodated in-core than originally anticipated,²³ and those stations with both channels outside the core will have the most difficulty converting to digital. Those stations will not only have to build two DTV stations, but will also engage in an expensive education campaign to migrate their viewers to their new channel at the end of the transition. Six of the stations in this situation are public television licensees.

These public television stations should not be forced to bear this extraordinary cost if they conclude that it will materially impair their ability to serve their communities. Accordingly, Public Television urges the Commission to allow them to defer construction of their DTV station until their permanent DTV channels have been assigned and they can commence operation on those channels.²⁴ Unlike those public television stations with one or both of their channels within the core, stations with both their NTSC and DTV channels outside the core will not have the option of an overnight switch to their NTSC channel. Permitting them to defer construction of their DTV station will serve the public interest, because it will alleviate the additional burden of building two digital facilities that these stations face.

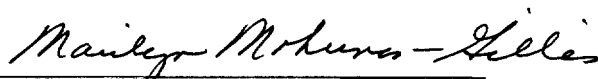
²³ See Notice ¶ 37.

²⁴ Public Television anticipates that in most cases this will be at the end of the transition. However, since the transition date may vary from market to market as a result of the market-based test in Section 309(j)(14), it is possible that an out-of-core station will be able to move into the core prior to the transition in its market because stations in adjacent markets have ceased operating on one of their two in-core channels.

CONCLUSION

Public Television appreciates the opportunity to participate in this proceeding, and urges the Commission to adopt the proposals set forth above. Public Television fully supports the transition to digital television, and is confident that with the proposals advanced here and by the Joint Broadcasters the transition can occur in a fashion that supports a robust public television service.

Respectfully submitted,



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